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Supreme Court, U.S.
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No. (1)

UNITED STATES
SUPREME COURT

ROBERT GOZA,

Petitioner

-v.-

STATE OF MICHIGAN

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE WAYNE COUNTY, MICHIGAN
CIRCUIT COURT

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QUESTIONS PRESENTED

Petitioner Robert Goza was convicted of second degree murder and armed robbery at a bench trial, at which we submit serious constitutional error occurred. He was sentenced to 25 to 60 years in prison. Relief was denied in the state courts. The Circuit Court found there was good cause for the delay in filing the motion, and did not find any procedural defaults, but denied the motion on the merits.

The questions presented are:

QUESTION 1: WHETHER PETITIONER WAS UNCONSTITUTIONALLY PREJUDICED BY THE INTRODUCTION INTO EVIDENCE OF CODEFENDANT GREEN'S CONFESSION TO POLICE, WHICH A FEDERAL COURT LATER FOUND TO HAVE BEEN AN INVOLUNTARY STATEMENT.

QUESTION 2: WHETHER THERE WAS INSUFFICIENT EVIDENCE TO SUPPORT THE CONVICTIONS.

QUESTION 3: WHETHER PETITIONER'S RIGHT TO REMAIN SILENT WAS VIOLATED.

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STATE OF MICHIGAN

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PETITION FOR A WRIT OF CERTIORARI
TO THE WAYNE COUNTY, MICHIGAN
CIRCUIT COURT

ROBERT GOZA, Petitioner, by and through his attorney, James S. Lawrence, moves this Court to issue a Writ of Certiorari to review the ruling of the Wayne County Circuit Court of Sixth Circuit Court of Appeals of September 19, 2006, denying a Motion for Relief from Judgment, with the Michigan Court

of Appeals denying leave to appeal July 26, 2007, and the Michigan Supreme Court denying leave to appeal November 29, 2007.

OPINIONS BELOW

The Appendix includes Michigan Supreme Court order, November 29, 2007; Michigan Court of Appeals order, July 14, 2007; Wayne Circuit Court order, September 19, 2006; United States District Court Memorandum and Order in case of codefendant, *Green v. Stegall,* E.D. Mich. Case No. 95-73785 , December 10, 1998; Michigan Supreme Court order, June 30, 1995; Michigan Court of Appeals opinion, November 2, 1994.

STATEMENT OF JURISDICTION.

This case began as a criminal prosecution in Wayne County, Michigan, Circuit Court. The original judgment was entered November 21, 1991. The ruling of the Circuit Court denying a Motion for Relief from Judgment was entered September 19, 2006. The order of the Michigan Court of Appeals was issued July 14, 2007. The final judgment of the Michigan Supreme Court was issued November 29, 2007. This Court has jurisdiction under 28 U.S.C. §1257.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

The Fourteenth Amendment to the United States Constitution provides:

> "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law; nor deny to any

person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

Statement of Proceedings

Petitioner Robert Goza was convicted in Wayne County Circuit Court of second degree murder and armed robbery in a bench trial before the Hon. Beverly Jasper. On November 21, 1991, she imposed sentences of 25 to 60 years on each count. Case No. 91-5995. The Michigan Court of Appeals affirmed on November 2, 1994. Case No. 151735. The Michigan Supreme Court denied leave to appeal June 30, 1995. Case No. 101560.

Petitioner was jointly tried with codefendants Anthony Green, George Dotson (tried in bench trials) and Erick Webster (tried in a jury trial).

Petitioner's codefendant Anthony Green received Habeas Corpus relief from the United States District Court, Eastern District of Michigan, on December 10, 1998. *Green v. Stegall*, E.D. Mich. Case No. 95-73785. The state's appeal to the Sixth Circuit was dismissed April 12, 1999. Case No. 99-1062. The ruling found that out of court statements of Anthony Green, admitted at trial, were involuntary.

Petitioner filed a Motion for Relief from Judgment in the Wayne County Circuit Court, which

was denied on the merits by Judge Timothy Kenny on September 19, 2006. The Michigan Court of Appeals denied leave to appeal July 14, 1997. Case No. 276870. The Michigan Supreme Court denied leave to appeal November 29, 2007. Case No. 134727.

Statement of Facts

Dr. Sawait Kanleun, Deputy Chief Medical Examiner for Wayne County testified that the deceased Nicole Cash died from multiple gunshot wounds. (T I, 139). Donna Cash identified the body of the deceased to be Nicole Cash (T I, 150-151).

Damen Youngblood testified that he and Nicole Cash (the deceased) were alone in the house on Trinity Street on the night in question (T I, 155). Ms. Cash opened the front door, and that co-defendant Webster was standing on the porch with another individual. (T I, 159-160). The two individuals forced their way into the house. (T I, 163-169). He testified that he observed co-defendant Webster shoot Ms. Cash in the head. (T I, 17 1-172). Although the witness testified that he recognized co-defendant Webster, he was unable to identify the other individual. (T I, 160).

Sergeant Deborah Monte testified that she took two statements from the Defendant (T II, 22-26; 37-38). Defense counsel objected to both statements. (T

II, 26-28; 38). The Court overruled the objections and the statements were read into the record. (T II, 29-37; 38-41). Petitioner Goza's own statement to police was that he was outside and heard shots fired inside. (T I, 31-32). He does not confess to wanting a killing or participating in a killing.

She also gave testimony recounting Anthony Green's confession. (T II, 13-21). Anthony Green's statement mentions the activities of Petitioner several times.

Eric Youngblood testified that he lived at the incident location with the deceased, Nicole Cash (T II, 103-104). He testified that he had left the house on the day in question at 4:00 p.m, and did not returned until 5:30 a.m. the following day (T II, 47). He further testified that his bedroom had been ransacked, and that several items were missing including a safe with cash and weapons. (T II, 50-54).

Loamoadre Vann testified that he, Petitioner Goza, and co-defendant Dotson went to a motel (T II, 100). He also testified that he questioned Defendant and co-defendant Dotson about the incident, and that the Defendant said "yes, but you don't know anything." Petitioner Goza did not express any knowledge of the incident. (T II, 103-104). Mr. Vann testified that most of his statement to the police was the truth (T II, 105). He further testified that he observed codefendant Dotson with large

amounts of money at the motel, and that Dotson said the money came from the safe (T II, 106-107). He also testified that the Defendant was counting the money (T II,110).

On cross-exam, however, Mr. Vann admitted that he committed perjury at the preliminary exam. (T II, 114). He further admitted that he lied to the police when he gave his statement (T II, 115-116, 122). He then testified that the deceased's boyfriend and prosecution witness Eric Youngblood abducted him prior to trial and threatened him into changing his testimony from his preliminary exam testimony. (T II, 119). He also indicated that his in-court testimony was based on his statement to the police (T II, 122-123). Finally, Mr. Vann testified that Petitioner Goza neither stated nor implied that he (Goza) participated in the robbery (T II, 118).

The next witness to testify was LaTonya Goza, cousin of Petitioner. Ms. Goza testified that around 6:00-8:00 P.M. on May 22, 1991, all the codefendants were in the basement of a house on Freeland with Ms. Goza (T II, 139). She stated that everyone was drinking, music was playing, and some individuals were playing video games (T II, 140-141). She testified that she began to talk on the telephone and had to move to the stairs because the music was too loud (T II, 142-143). She testified that she overheard a codefendant say he "wanted his (expletive) money." (T II, 145). She testified that she also overheard a

codefendant say he knew where the safe was and that he would knock with two in the front and two in the back (T II, 146-148). She also stated that no one responded to these statements (T II, 147, 148). She then testified that all four co-defendants left at the same time (T II, 149). The witness then testified that codefendant Dotson admitted to killing the decedent; but she couldn't remember if he talked about the actions of anybody else (T II, 161-163).

The final witness was Officer Neil Gracer. Officer Gracer testified that he and his partner responded to the incident location and found the deceased lying by the front door (T II, 194-196). He further testified that he got a description of the perpetrators from Damen Youngblood and he noted that the bedroom was in disarray (T II, 199-202).

Closing arguments for all three bench trial defendants were heard on October 18, 1991. The judge then issued a verdict finding all three guilty of second degree murder and armed robbery. (T IV, 73-79). On November 1991, the Court imposed a sentence term of 25 to 60 years on both counts (ST, 13). Defendant appealed his conviction to the Court of Appeals. He raised three issues.

THE COURT IMPROPERLY ALLOWED INADMISSIBLE STATEMENTS TO COME INTO EVIDENCE AGAINST THE DEFENDANT AS ADOPTIVE

ADMISSIONS

THE DEFENDANT WAS ERRONEOUSLY SCORED 50 POINTS FOR 0V 3 IN THE SENTENCING INFORMATION REPORT

THE CORPUS DELICTI OF THE CRIME WAS NOT PROVEN PRIOR TO THE ADMISSION OF THE DEFENDANT'S CONFESSION

Petitioner later filed a Motion for Relief from Judgment raising the instant issues and others.

REASONS FOR GRANTING THE WRIT

QUESTION 1: WHETHER PETITIONER WAS UNCONSTITUTIONALLY PREJUDICED BY THE INTRODUCTION INTO EVIDENCE OF CODEFENDANT GREEN'S CONFESSION TO POLICE, WHICH A FEDERAL COURT LATER FOUND TO HAVE BEEN AN INVOLUNTARY STATEMENT.

It is our position that since the introduction of an involuntary statement against the speaker is unconstitutional, it is also unconstitutional to introduce that same involuntary statement against a codefendant. Where prejudicial, this should result in the grant of a new trial.

Petitioner's codefendant Anthony Green received Habeas Corpus relief from the United

States District Court, Eastern District of Michigan, on December 10, 1998. Case No. 95-73785. The state's appeal to the Sixth Circuit was dismissed April 12, 1999. Case No. 99-1062. The ruling found that the out of court statements of Anthony Green, admitted at trial, were involuntary, and granted Habeas Corpus relief. Some of the reasons for the finding of involuntariness were the length of interrogation, and use of deliberately tightening handcuffs and other physical pressure to encourage Mr. Green to talk.

An involuntary statement is not to be used in evidence. Part of the reasoning behind the exclusion of involuntary statements is that they are likely to be unreliable. *Lego v. Twomey*, 404 U.S. 477 (1972); *Miller v. Fenton*, 474 U.S. 104 (1985); *Jackson v. Denno*, 378 U.S. 368 (1964); *Blackburn v. Alabama*, 361 U.S. 199 (1960).

The protection against unreliable evidence in criminal and non-criminal cases has been a particular concern of the Supreme Court. See, for example, *Watkins v. Sowders*, 449 U.S. 341 (1981): "It is the reliability of identification evidence that primarily determines its admissibility." See also *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993) [court must assess reliability of proffered scientific technique before allowing evidence derived from it to be presented to jury].

When a person is put under physical stress as

part of an interrogation, most people, sooner or later, are going to give in to saying what the people doing this to them want them to say. See *Mincey v. Arizona*, 437 U.S. 385 (1978) [Petitioner ""at the complete mercy" of Detective Hust, unable to escape or resist the thrust of Hust's interrogation"; held statements could not even be used for impeachment]. See also *Beecher v. Alabama*, 389 U.S. 35 (1967); *Brown v. Mississippi*, 297 U.S. 278 (1936).

Codefendant Anthony Green's confession, held to have been unconstitutionally obtained, was read into evidence. (T II, 13-21). It mentions the activities of "Rob" several times. [1] It was discussed by the prosecutor in closing argument.

In this case, three defendants were tried by bench trial, and one by jury trial. The bench trial arguments were one after another, and the judge then entered verdicts in all the bench trial cases.

We submit that the finding of the state court that the trial judge sitting as trier of fact would be able to "compartmentalize" the evidence as to each defendant was unreasonable.

In support of this, we point to the actual findings of fact of the trial judge, (T III, 73-79) where

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[1] Several potential legal issues are presented by this scenario. Some lost in the first appeal and are not renewed here, but certainly would be renewed if it were allowed. Here, we raise only the issues raised in the Motion for Relief from Judgment, which mainly arise from the 1998 United States District Court ruling in the case of codefendant Anthony Green.

she discusses the evidence against the 3 bench trial defendants as a whole. She finds all three of them guilty all in the same sentence. Certainly the format used by the judge, hearing argument on the three cases in sequence, then deciding them all together, was not designed to compartmentalize anything.

Judge Kenny, in denying the motion, used the presumption that Judge Jasper would be "presumed to follow the law." However, Judge Jasper repeatedly displayed a failure to follow proper procedures. She ruled that no defendant could complain of evidence introduced purportedly against another defendant. She ruled that neither Anthony Green nor anyone else could complain about the admissibility of the statement because Green disagreed with the officer over what was said. She refused even to determine if the Green statement was involuntary. (T I, 134-135; T 8-31-91, 27-28). The United States District Court in Green's case rightfully castigated that type of ruling.

If the trier of fact can hear Green's out of court statement talking about Goza, and Goza is not allowed even to speak an objection, that is a clear due process violation. Any evidence heard by the trier of fact in a case is reasonably likely to affect the outcome of that defendant's case, particularly if it is relevant (Green's statement was clearly relevant) and particularly if it expressly discusses the alleged role of the other defendant (Green's statement

mentions Petitioner Goza several times). Judge Jasper's policy barring objection by defendants affected by the testimony is a monument to violation of due process of law, because it takes away the most essential element of due process, the right to be heard. *Mullane v. Central Hanover Trust Co*, 339 U.S. 306 (1950); *Boddie v. Connecticut*, 401 U.S. 371 (1971).

The standards used by the Michigan courts for determining prejudicial nature of errors in bench trials contributed substantially to this incorrect ruling. The rule of *Bruton v. United States*, 391 U.S. 123 (1968) is instructive. The United States Supreme Court applies this rule to bench trials. They find that a codefendant's statement implicating the accused is reasonably likely to affect the judge as trier of fact in a bench trial. *Lee v. Illinois*, 476 U.S. 530 (1986). Yet, Michigan courts find that the *Bruton* rule does not even apply to bench trials, because the judge can be trusted to compartmentalize the evidence. *People v. Butler*, 193 Mich. App. 63 (1992). We submit this type of analysis is inherently in opposition to *Lee v. Illinois*.

The Sixth Circuit case of *Stallings v. Bobby*, 464 F.3d 576 (6th Cir. 2006) is also instructive. In that case, the Sixth Circuit rejected the state's claim that simply because it was a bench trial, the trial judge would know to, would decide to, and would be effectively able to disregard evidence that he would

hear.

In determining prejudicial nature of an error, it is useful to look at the other evidence in a case; if overwhelming, a constitutional error of this nature could be harmless. *Stallings v. Bobby*, supra. In this case, there was testimony that Petitioner Goza was present while Erick Webster and George Dotson discussed money owed by Mr. Youngblood and how they might get it back. He then left at the same time as the others. (T II, 139-149). Significantly, no witness testified to Petitioner Goza being present at the scene of the killing, agreeing to a killing, or committing a killing. In fact, Damen Youngblood testified that he saw Erick Webster commit the killing, and Petitioner Goza was not in sight. (T I, 171-172). Petitioner Goza's own statement to police was that he was outside and heard shots fired inside. (T I, 31-32). He does not confess to wanting a killing or participating in a killing. The killing was an unexpected event.

We therefore submit that the statement by Mr. Green was reasonably likely to have affected the verdict, making it prejudicial. *Brecht v. Abrahamson*, 507 U.S. 609 (1993).

We submit this Court should follow its ruling in *Lee v. Illinois*, and refuse to uphold the state court ruling that the existence of a bench trial means that codefendant's statements implicating the defendant are immune from review because judges are

presumed to not be affected by evidence that mentions the defendant's name. We submit this Court should follow its rulings in *Lego v. Twomey* and *Miller v. Fenton*, and find that the use of Green's involuntary statement naming Goza requires that the case against Goza be remanded for a new trial without such evidence.

We submit that the nature of the issues of reliability and harmfulness of error in a bench trial, which in the past have been important to Supreme Court jurisprudence, continue to be important to that jurisprudence, and that the instant case is well suited for examination of such issues.

QUESTION 2: WHETHER THERE WAS INSUFFICIENT EVIDENCE TO SUPPORT THE CONVICTIONS.

Due process requires that no criminal conviction be sustained unless each fact the prosecutor is required to prove for conviction is supported by proof beyond a reasonable doubt. *In Re Winship*, 397 U.S. 358; 90 S.Ct. 1068; 25 L.Ed.2d 363 (1970); U.S. Const., Amend. XIV. Sufficiency of evidence is measured by the standards of *Jackson v. Virginia*, 443 U.S. 307; 99 S.Ct. 2781; 61 L.Ed.2d 560 (1979), which states:

> "[T]he Fourteenth Amendment protects a defendant in a criminal case

> against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged."

The Court in *Jackson* discussed the importance of the rule established in *Winship*:

> "The standard of proof beyond a reasonable doubt, said the Court, "plays a vital role in the American scheme of criminal procedure," because it operates to give "concrete substance" to the presumption of innocence to ensure against unjust convictions, and to reduce the risk of factual error in a criminal proceeding."

Under Michigan law, to convict of second degree murder, it must be shown that the defendant had an intent to kill or do great bodily harm, or intentionally created a very high risk of death with knowledge of the probable consequences, *People v. Woods*, 416 Mich. 581 (1982). To convict as an aider and abetter, the defendant must personally possess the intent necessary to convict for the crime. *People v. Usher*, 121 Mich. App. 345, 350 (1982); *People v. Hart*, 161 Mich. App. 630 (1987); *People v. Wright (on remand)*, 99 Mich. App. 801, 820 (1980); *People v. Gordon*, 60 Mich. App. 412, 418 (1975); *People v. Kelly*, 423 Mich. 261, 278 (1985).

There clearly was no evidence that Petitioner

Goza personally committed the killing. No witness testified to Petitioner Goza being present at the scene of the killing, agreeing to a killing, or committing a killing. In fact, Damen Youngblood testified that he saw Erick Webster commit the killing by shooting, and Petitioner Goza was not in sight. (T I, 171-172).

There was no physical evidence tying Petitioner Goza to the killing, no fingerprints, blood, hair, fiber, gunshot residue, etc.

There clearly was no evidence that Petitioner Goza discussed a killing, or was present when others discussed a killing. The main basis to convict him of anything is the testimony of his cousin, LaTonya Goza, that Petitioner Robert Goza was present in a basement when codefendants stated that they wanted their money back from Eric Youngblood and that he had a safe that probably had money in it. (T II, 139-149). Significantly, there was no discussion of killing at all.

Petitioner's own statement to police said that he was outside the house when he heard shots. He did not confess to wanting a killing or participating in a killing. The killing was an unexpected event. (T I, 31-32).

In *People v. Aaron*, 409 Mich. 672 (1980), the Michigan Supreme Court held that intent to participate in the robbery is not sufficient intent to make a person guilty of murder. They stated:

> "In situations involving the vicarious liability of co-felons, the individual liability of each felon must be shown. It is fundamentally unfair and in violation of basic principles of individual criminal culpability to hold one felon liable for the unforeseen and unagreed-to results of another felon."

"The Michigan Supreme Court has indicated that the crime of murder, no matter its type, requires proof of intent." *People v. Herndon*, 246 Mich. App. 371 (2001), citing to *People v. Aaron*, 409 Mich. 672 (1980).

At the trial, there was zero evidence that any killings had been discussed. There was zero evidence that Petitioner Goza knew of, or approved, a killing.

Even if there is an armed robbery conspiracy, if homicide is not within the main purpose of the conspiracy, robbery participants are not criminally liable for the homicide. *People v. Flowers*, 191 Mich. App. 169 (1991). Mere presence is not enough to convict. *People v. Turner*, 125 Mich. App. 8 (1983). In this case, even the mere presence is attenuated, in that the killing took place inside the house and Petitioner Goza was outside the house.

There was no evidence that the shooting of Nicole Cash by Erick Webster was part of any plan to which Petitioner agreed and took part in.

Even if Petitioner Goza was present outside the

house at the time of the shooting, there was nothing in the evidence to suggest that the killing in the house by Erick Webster was anything other than "the unforeseen and unagreed-to results of another felon," *People v. Aaron*, supra, as to Mr. Goza. Certainly, there was nothing to prove it beyond a reasonable doubt.

See *United States v. Stewart*, 145 F.3d 273 (5th Cir. 1998): "A verdict may not rest on mere suspicion, speculation or conjecture, or on an overly attenuated piling of inference on inference." "The evidence supporting conviction must be substantial and must do more than raise a mere suspicion of the defendant's guilt." *United States v. Leos-Quijada*, 107 F.3d 786, 794 (10th Cir. 1997).

It is certainly of significance that in the findings of fact by the trial judge, Judge Jasper (T III, 73-79), there is not a single finding that links Petitioner Goza to the killing, and no mention of any evidence that supports that he was involved in, or knew there was going to be, a killing. A finding of guilt must be based upon evidence; not upon speculation. *Speigner v. Jago*, 923 F.2d 427 (6th Cir. 1991); *United States v. Dunlap*, 28 F.3d 823, 827 (8th Cir. 1994).

In the findings of the successor judge, Judge Kenny, denying the motion, the judge found that the "circumstantial evidence" showed that Petitioner Goza participated in an "armed, non-consensual entry," but does not explain how being outside

constitutes participation in an entry, and improperly applies a presumption that if someone is armed, that means that non-armed people have an intent to kill.

Judge Kenny simply did not address the enormous gap between knowing that someone has a gun, and knowing that the gun-wielder intends to kill. The evidence to convict of murder was insufficient, the analysis used by Judge Kenny was flawed, and the analysis used by Judge Jasper was virtually nonexistent.

We submit that because there was no evidence linking Petitioner to the killing, or to pre-existing knowledge there would be a killing, there was not sufficient evidence to convict of murder.

The same is true, for different reasons, as to robbery. The discussion in the basement, the key evidence against Petitioner, involved codefendants Webster and Dotson stating that they only wished to retrieve money that was theirs. (T II, 139-149).

Under Michigan law, a person who retrieves what is theirs, even if he acts forcefully, has not committed robbery or larceny of any sort. *People v. Hillhouse*, 80 Mich. 580 (1890); *People v. Henry*, 202 Mich. 450, 455 (1918); *People v. Shaunding*, 268 Mich. 218, 219 (1934); *People v. Holcomb*, 395 Mich. 326 (1975). As the Court held in *Henry*, supra:

> "If the defendant in good faith believed that the money which he demanded was

> his money, and that he was entitled to its possession, he could not be guilty of either robbery or larceny in taking it, because there would be no felonious intent"

The evidence showed that Petitioner learned of a plan to retrieve the codefendant's money from the wrongful possessor of that money. He was never informed of any robbery, and therefore any participation did not constitute robbery.

In determining the sufficiency of evidence, the elements of the crime are established by state law, but whether the evidence is sufficient is a question of federal law.

In the case of *In Re Winship*, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970), the United States Supreme Court said:

> "It is critical that the moral force of the criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned. It is also important in our free society that every individual going about his ordinary affairs have confidence that his government cannot adjudge him guilty of a criminal offense without convincing a proper factfinder of his guilt with utmost certainty."

The Court in *Jackson v. Virginia* discussed the fact that triers of fact on occasion will convict a

defendant even if a rational trier of fact could not properly find proof beyond a reasonable doubt, and that in such a case it is the duty of the reviewing court to grant relief:

> "Yet a properly instructed jury may occasionally convict even when it can be said that no rational trier of fact could find guilt beyond a reasonable doubt, and the same may be said of a trial judge sitting as a jury. In a federal trial, such an occurrence has traditionally been deemed to require reversal of the conviction. [Cites omitted]. Under *Winship*, which established proof beyond a reasonable doubt as an essential of Fourteenth Amendment due process, it follows that when such a conviction occurs in a state trial, it cannot constitutionally stand."

The question of when participation in one crime makes a defendant liable for all crimes committed is certainly a question of major significance to the jurisprudence of the Supreme Court. The question of when intent to retrieve property from a wrongdoer constitutes robbery is perhaps of lesser importance, but still important enough to justify a grant of certiorari.

This Court should reverse the convictions for insufficient evidence. In the event that only one of the convictions is reversed for insufficient evidence, Petitioner should be resentenced on the remaining

count, since the sentence on the count of conviction was affected by incorrect information of Petitioner being guilty of both counts. Sentencing based on inaccurate information denies due process. *Townsend v. Burke*, 334 U.S. 736; 68 S.Ct. 1252; 92 L Ed 1690 (1948); *United States v. Moore*, 540 F.2d 1088 (D.C. Cir. 1976); *McGee v. United States*, 496 F.2d 243 (2d Cir. 1972); *Jerkins v. United States*, 530 F.2d 1203 (5th Cir. 1975); *James v. United States*, 476 F.2d 936 (8th Cir. 1973).

QUESTION 3: WHETHER PETITIONER'S RIGHT TO REMAIN SILENT WAS VIOLATED.

Petitioner Goza testified at a pretrial hearing that when questioned by Investigator Monte, he declined to answer any questions. However, she continued with him for hours, often leaving him alone and returning to resume questioning, and made promises of benefits to him if he answered, until he finally gave in and made a statement. (T 8-31-91, 34-37).

Petitioner's statement (T II, 139-149), while not a full confession, contains admissions that he was outside the house where the killing took place, and that he knew of an intent to take property from the residence. It therefore substantially contributed to Petitioner's conviction.

We submit the statement does not confess to

robbery because of Michigan's "claim of right" defense, because Petitioner said that codefendant Dotson declared he was only trying to retrieve money he was owed. *People v. Hillhouse*, 80 Mich. 580 (1890); *People v. Henry*, 202 Mich. 450, 455 (1918); *People v. Shaunding*, 268 Mich. 218, 219 (1934); *People v. Holcomb*, 395 Mich. 326 (1975). As the Court held in *Henry*, supra:

> "If the defendant in good faith believed that the money which he demanded was his money, and that he was entitled to its possession, he could not be guilty of either robbery or larceny in taking it, because there would be no felonious intent"

Moreover, the statement does not admit to any involvement in the killing or intent to kill, though it does place Petitioner somewhat near to the killing, immediately outside the house.

The Circuit Judge ruled that she did not believe Petitioner concerning the circumstances of the interrogation. (T 8-31-91, 45-46). While this normally would end the matter, unique circumstances of this case permit review, or at least a remand for redetermination of the issue.

In *Miranda v. Arizona*, 384 U.S. 436 (1966), the Court established the basic rules for interrogation, which included the following:

> "Once warnings have been given, the subsequent procedure is clear. If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease.FN44 At this point he has shown that he intends to exercise his Fifth Amendment privilege; any statement taken after the person invokes his privilege cannot be other than the product of compulsion, subtle or otherwise. Without the right to cut off questioning, the setting of in-custody interrogation operates on the individual to overcome free choice in producing a statement after the privilege has been once invoked. If the individual states that he wants an attorney, the interrogation must cease until an attorney is present. At that time, the individual must have an opportunity to confer with the attorney and to have him present during any subsequent questioning. If the individual cannot obtain an attorney and he indicates that he wants one before speaking to police, they must respect his decision to remain silent."

In *Michigan v. Mosley*, 423 U.S. 96 (1975), the Supreme Court made clear that under U.S. Const., Amend. V, the police must "scrupulously honor" any invocation by a suspect of his right to remain silent:

> "A reasonable and faithful interpretation of the Miranda opinion must

> rest on the intention of the Court in that case to adopt "fully effective means . . . to notify the person of his right of silence and to assure that the exercise of the right will be scrupulously honored . . . ." 384 U.S., at 479, 86 S.Ct., at 1630. The critical safeguard identified in the passage at issue is a person's "right to cut off questioning." Id., at 474, 86 S.Ct., at 1627. Through the exercise of his option to terminate questioning he can control the time at *104 which questioning occurs, the subjects discussed, and the duration of the interrogation. The requirement that law enforcement authorities must respect a person's exercise of that option counteracts the coercive pressures of the custodial setting. We therefore conclude that the admissibility of statements obtained after the person in custody has decided to remain silent depends under Miranda on whether his "right to cut off questioning" was "scrupulously honored."

The circumstances that allow the redetermination are as follows:

1. Petitioner's statements about the circumstances of the interrogation have been confirmed by a polygraph examination, submitted to the state courts. Michigan considers polygraph results admissible in a motion seeking a new trial. *People v. Barbara*, 400 Mich. 352 (1977); *People v. Mechura*, 205 Mich. App. 481 (1994).

2. United States District Court Judge Avern Cohn, in considering the case of *Green v. Stegall*, supra, ruled that the testimony of Investigator Monte was not believable and found that Anthony Green's version of events was the more credible.

The findings of Judge Cohn constitute new evidence, which permits a redetermination of the issue without regard to rules of "law of the case." *United States v. Robinson*, 690 F.2d 869 (11th Cir. 1982); *United States v. Cirami*, 563 F.2d 26 (2d Cir. 1977); *Champaign-Urbana News v. J.L. Cummins*, 632 F.2d 680 (7th Cir. 1980).

This Court should grant certiorari to determine this issue, and whether newly discovered evidence requires that the matter be redetermined.

CONCLUSION

Petitioner Robert Goza respectfully submits that for the reasons stated above, including the fact that the lower court ruling was on the merits and not on the basis of procedural default, this Court should grant Certiorari and Habeas Corpus relief. On question 1 this Court should grant a new trial. On question 2, this Court should vacate and dismiss both convictions or, failing that, vacate and dismiss one conviction and remand the other for resentencing. On question 3 this Court should remand the case for a redetermination on the statement issue, and/or grant a new trial.

Respectfully submitted,

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Dated: February 15, 2008

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee
v
GEORGE DOTSON,
Defendant-Appellant.

November 2,1994
No. 149768
LC No. 91-05995

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,
v
ANTHONY GREEN,
Defendant-Appellant.

No.150816
LC No. 91-05995

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,
v
ROBERT GOZA,
Defendant-Appellant.

No. 151735
LC No. 91-05995

Before: Sawyer, P.J., Weaver and S.A. Turner,* JJ.

PER CURIAM. Each of the defendants were convicted, following bench trials, of murder in the second degree, MCL 750.317; MSA 28.549. and armed robbery, MCL 750.529;

*Circuit judge, sitting on the Court of Appeals by assignment.

MSA 28.797. Each received terms of twenty-five to sixty years on the murder convictions, and on the armed robbery convictions, defendant Dotson received a term of fifteen to sixty years, defendant Green received a term of fifteen to thirty years, and defendant Goza received a term of twenty-five to sixty years. They now appeal and we affirm. We turn first to an issue raised by each of we defendants, namely the admissibility against them of statements made by Dotson and codefendant Erik Webster. This issue concerns the testimony of defendant Goza's cousin, LaTonya Goza, who testified that prior to the robbery and murder in the case at bar, defendants were in the basement of her house and she overheard parts of their conversation. Specifically, she heard defendant Dotson say that he wanted his money and codefendant Webster state that he knew where the victim's boyfriend stayed and that he had a safe in the house and that there was money all over the house. Webster then stated he would knock on the front door and kick the door in. Thereafter, all four defendants left together. The trial court ruled the statements admissible as adoptive admissions under MRE801(d)(2)(b).

While it is true that defendants did not specifically make statements adopting those admissions, we believe that they can properly be termed adoptive admissions in light of the circumstances in which they were made. The

statements were concerned with the planning of a crime, no objections were voiced to those plans, and defendants left together to commit the crime. We would further note mat the statements would nevertheless be relevant under an aiding and abetting theory to demonstrate that all of the participants to the crime knew what was intended, to dissuade a defense of being an "innocent bystander."

For the above reasons, we conclude that LaTonya Goza's testimony concerning the statement she heard from Dotson and Webster were admissible in each of the defendants' trials. We now turn to the individual issues raised by defendants.

Defendant Dotson

Defendant Dotson first argues mat mere was insufficient evidence to convict him of either robbery or murder. We disagree. We review a sufficiency of we evidence argument by looking at the evidence in me light most favorable to the prosecution and determining whether a rational trier of fact could find that the essential elements of me crime were proven beyond a reasonable doubt People v Petrella. 424 Mich 221, 268-269; 380 NW2d 11 (1985). There was more than sufficient evidence to support a conviction for both armed robbery and second-degree murder. Specifically, LaTonya Goza testified that she

heard defendant state that he wanted his money, heard the discussion as to where Eric Youngblood lived, that there was money to be found in Youngblood's house, as well as the plans to gain entry to the house. Furthermore, LaTonya Goza further testified that after the killing defendant told her that he was the one who shot the decedent. If believed by the trier of fact, which apparently it was, this would be sufficient to convict defendant Indeed, this evidence would be sufficient to have convicted defendant of first-degree felony murder.

Next, defendant argues mat he was denied due process of law when the trial court instructed his attorney that he could not object to testimony describing the actions of a codefendant. However, defendant misrepresents the nature of the trial court's instructions. The statement by the trial court came in the context of an inquiry by Webster's attorney concerning the procedures to be followed at trial, since there was one jury trial for Webster, and three bench trials for the remaining defendants being run as part of the same proceeding. The trial court did not preclude any attorney from raising any objection the attorney felt necessary to protect his client's interests, the court merely cautioned the attorneys that they should be raising only those objections which did deal with their own client's interests. That is, the attorneys were cautioned not

to raise objections which involved matters that would only affect one of the other defendants. Accordingly, defendant's attorney was free to raise whatever objection he felt was in his client's interest.

Next, defendant argues that the trial court erred in denying his motion to quash the information. We disagree. Defendant's claim that the trial court ruled on the motion to quash without having read the preliminary examination transcript misrepresents the record. While the trial court's comments at the initial hearing on this matter indicate that it had not in fact read the preliminary examination transcript, the motion to quash was not denied until a subsequent hearing, at which the trial courts comments make it clear that it had, at that point, read the transcript. Accordingly, defendant's claim that the trial court improperly denied the motion to quash without having read the transcript is without merit.

Defendant also suggests that if the trial judge had read the transcript, she would have been obligated to disqualify herself from presiding over the bench trial under People v Ramsey. 385 Mich 221; 187 NW2d 887 (1971). However, we are not persuaded that Ramsey applies to the case at bar. Ramsey involved a situation in which the trial judge, sitting as the trier of fact, reviewed the preliminary examination transcript in connection with the trial itself in order to supplement the

factual record. In the case at bar, on the other hand, the trial judge did not read the preliminary examination transcript as evidence at the trial, but merely reviewed it in connection with the motion to quash. Accordingly, Ramsey does not apply to the case at bar. Next, defendant argues that the trial court erred in denying his motion for severance and by the introduction at the joint trial of the out-of-court statements of codefendants Goza and Green. We disagree. Defendant argues that the trial court violated the rule established in Bruton v United States. 391 US 123; 88 S Ct 1620; 20 L Ed 2d 476 (1968), by allowing the introduction of the confessions of the codefendants at the joint trial. However, this Court in People v Butler. 193 Mich App 63, 66; 483 NW2d 430 (1992), held that the Bruton rule does not extend to bench trials. Defendant Dotson's final argument is that be was denied the effective assistance of counsel by counsel's failure to present the claim of right defense to the robbery charge. We disagree. To establish a claim of ineffective assistance of counsel, defendant must overcome the presumption that the challenged action might be considered sound trial strategy. People v Tommolino. 187 Mich App 14, 17; 466 NW2d 315 (1991). Defendant has not overcome that presumption.

Defendant Green

Turning to the issues raised by defendant Green, he first argues that the trial court erred in introducing his statement which was not voluntarily obtained and obtained in violation of his right to counsel. We disagree. At the Walker hearing held concerning the admissibility of defendant's alleged statement to the police, defendant did not contest either the voluntariness of the statement or whether he had invoked his right to counsel, but rather denied making a statement to the police at all. That is, defendant claimed at the hearing that he had made no statements, that the answers to the questions in his alleged confession had come from the interrogating officer. Thus, the question was not whether defendant had voluntarily made a statement, but whether he bad made a statement at all. This latter question involves a question of credibility to be resolved by the trier of fact. That is, that was for the trier of fact to determine whether the officer testified truthfully concerning defendant's having made a statement and the content of that statement.

Next, defendant argues that he is entitled to resentencing because of inaccurate assumptions concerning his prior record and criminal history and to correction of misinformation in the presentence report. However, defendant has failed to preserve

this issue for appellate review raising the appropriate objection in the trial court. People v Persails, 192 Mich App 380, 384; 481 NW2d 747 (1991).

Defendant Goza

Finally, we turn to the issues raised by defendant Goza. First, defendant argues that the magistrate erred at the preliminary examination in admitting defendant's confession without the corpus delicti having been established. Specifically, defendant argues that there had been no evidence presented at the preliminary examination concerning an armed robbery on the deceased or that the deceased was killed during the perpetration of a robbery. Defendant, however, misapprehends what constitutes the corpus delicti for felony murder. The corpus delicti for felony murder is the same as for premeditated murder: that the victim is dead as the result of some criminal agency. People v Hughey, 186 Mien App 585, 589; 464 NW2d 914 (1990). Thus, it is not necessary to establish the commission of the underlying felony in order to satisfy the corpus delicti rule in a felony-murder case. la the case at bar, it was well established that the victim died and that the victim's death was the result of a criminal agency. Accordingly, defendant's confession was properly admitted. Defendant also argues that the

trial court erred in scoring fifty points for Offense Variable 3 in the sentencing information report. We disagree. Fifty points are appropriate for 0V 3 where, inter alia the homicide is committed during the perpetration of a robbery. Inasmuch as defendant was convicted of both murder and robbery, we are satisfied that there were sufficient facts to support the scoring of fifty points for this variable since the murder occurred during the perpetration of that robbery.

Affirmed.

/s/ David H. Sawyer
/s/ Elizabeth A. Weaver

Turner, J., not participating.

1 Defendant Dotson, of course, only contests in this respect the admission of the statement by Webster. We also note that although Webster's appeal is not consolidated with the instant case, it was also submitted to this same panel as Docket No. 150797.

2 People v Walker (On Rehearing). 374 Mich 331: 132 NW2d 87 (1965).

535 N.W.2d 797, 449 Mich. 866, People v. Goza, (Mich. 1995)

*797 535 N.W.2d 797 (The decision of the Court is referenced in the North Western Reporter in a table captioned "Supreme Court of Michigan Applications for Leave to Appeal.")

449 Mich. 866

People

v.

Robert Goza

NO. 101560. COA No. 151735.

June 30, 1995

Disposition: Leave to appeal DENIED.

Supreme Court of Michigan WEAVER, J., not participating.

MI TRIAL CT ORDER, 9-19-06
A11

STATE OF MICHIGAN
IN THE THIRD CIRCUIT COURT
FOR THE COUNTY OF WAYNE

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee. HON.TIMOTHY M KENNY
vs. CASE NO.91-005995
ROBERT GOZA,
Defendant-Appellant,

_____/

ORDER DENYING DEFENDANTS MOTION FOR RELIEF FROM JUDGMENT

At a session of this Court In the
Frank Murphy Hall of Justice,
City of Detroit, County of Wayne,
On this date: September 19.2006

In 1991, defendant Robert Goza along with three codefendants were tried before the Honorable Beveriy Ann Jasper of the Recorder's Court of the City of Detroit. Defendant Goza was convicted after a bench trial of one count of second degree murder and one count of armed robbery. The defendant was sentenced to 25 to 60 years on each of the two counts.

In 1994, the Michigan Court of Appeals affirmed the defendant's conviction and

sentence. In 1995, the Michigan Supreme Court denied defendant Goza's application for leave to appeal. The defendant now brings a motion for relief from Judgment pursuant to MCR 6.500 et seq. seeking a new trial. Defendant Goza's motion is based on the claim that the co-defendant Anthony Green's statement so tainted the joint trial that defendant Goza could not receive a fair trial. The defendant also claims there was insufficient evidence to convict him of second degree murder. In the motion for relief from Judgment, defendant Goza claims that he was denied effective assistance of counsel for prior counsel's failure to raise the two above-cited issues during trial.

Michigan Court Rule 6.508(D)(3)(a)(b) states:

> "(D) Entitlement to Relief. The defendant has the burden of establishing entitlement to the relief requested. The Court may not grant relief to the defendant if the motion...
>
> (3) alleges grounds for relief, other than jurisdictional defects, which could have been raised on appeal from the conviction and sentence or in a prior motion under this sub-chapter, unless the defendant

demonstrates...

(a) good cause for failure to raise such grounds on appeal In the prior motion, and...

(b) actual prejudice from the alleged irregularities that support the claim for relief."

With regards to the issue of good cause for failure to raise the grounds on appeal, this Court does find that the defendant's burden has been met. In challenging the use of the co-defendant Green's statement, appellate counsel could not raise the issue until Mr. Green prevailed in his case in the Federal District Court for the Eastern District of Michigan. For this reason, the Court will entertain the claim that the co-defendant Green's trial statement tainted Mr. Goza's trial and subsequent conviction.

In order to prove ineffective assistance of counsel, the defense must show (1) that counsel's performance was below an objective of standard of reasonableness under professional norms and that (2) there Is a reasonable probability that but for counsel's errors the result would have been different and the result that did occur was fundamentally unfair or unreliable. *Strickland vs Washington,* 486 US 668,104 8

Ct 2052,80 L Ed 2d 674 (1984). *People vs Riley (after* remand) 468 Mich 135; 659 NW2d 611 (2003).

Defendant Goza claims that a new trial is mandated in this case because Judge Jasper sitting as the trier of fact heard the alleged confession of co-defendant Anthony Green. Co-defendant Green's statement was ruled Involuntary in a habeas corpus action heard before the Honorable Avern Cohn in the United States District Court for the Eastern District of Michigan. Defendant Goza contends that the presentation of co-defendant Green's confession tainted the ability of the trier of fact to evaluate the evidence against defendant Goza. A trial judge hearing a bench trial is presumed to follow the law. This legal concept permits reviewing courts to give greater latitude to the trial court in reviewing alleged errors. *People vs Edwards,* 171 Mich App 613,431 NW 2d 83 (1988). *People vs Fanner, 30* Mich App 707,186 NW 779 (1971). Michigan appellate courts have also ruled that it is not necessary for the judge in a bench trial to make findings on every element of the offense. It is sufficient if the facts found indicate that the trial Judge was aware of the factual issues in the case and correctly applied the law. *People vs Wardlaw,* 190 Ml App 318,475 NW 2d 387 (1991), *People vs Armstrong,* 175 MI App 181,437 NW2d 343 (1989). In the present case,

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Judge Jasper clearly stated that she considered the case against each of the co-defendant's separately. The Court stated;

> "I have tried each of these cases as if the person were on trial separately and I have looked separately at the language, the conduct and the behavior of each of the two defendants."

Additionally, when co-defendant Anthony Green's statement, was being read into the record at the trial of the co-defendants, counsel for one co-defendant's stated: To preserve the record, I assume at this point the same understanding is that the statement only comes in as to Mr. Green, the individual defendant." The Court's response was to the co-defendant's attorney:" Mr. Cripps, 1 assume that you are only representing your client, but in answer to your question, yes."

In response to the concern of co-counsel regarding the limitation of Mr. Green's statement, the trial court stated in its fact finding that it reviewed and considered the testimony as if each individual defendant were on trial separately. This Court concludes that co-defendant Green's statement was not part of the verdict against the defendant Robert Goza. For these reasons, the defendants claim of error falls.

II.

The defendant Goza also claims that there was insufficient evidence to convict him of second degree murder. In reviewing whether there was sufficient evidence to support a conviction, the Court must review the evidence de novo in the light most favorable to the prosecution to determine whether a rational finder of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People vs Jobnson.* 460 Mich 720,597 NW 2d 73 (1999), The Court may consider both direct and circumstantial evidence. The prosecution is not required to negative all theories consistent with innocence. It is sufficient if the prosecutor can prove the case beyond a reasonable doubt. *People vs Doss,* 122 Mi App 571,332 NW 2d 541 (1983). In the present case, defendant Goza was convicted under an aiding and abetting theory. The concept of aiding and abetting comprehends all words or deeds that may support, encourage or incite the commission of a crime and includes the actual presence of a participant for the purpose of rending assistance. The amount of assistance or encouragement is not material, but requires that it had the affect of inducing the commission of the crime. *People v Palmer,* 392 Mich 370, 220NW

2d 393 (1974); MCLA Sec. 767.39.

An individual does not have to have an active stake In the outcome of a crime in order to be guilty of aiding and abetting. A defendant's presence can be enough to support a conviction as an aider and abettor where the presence of the defendant is intended to and does in fact aid the principal participants in the offense. *U.S vs Taytor,* 612 Ed 2d 1272 (10th Circuit 1980). The Michigan Supreme Court has long held that by voluntarily choosing to join the group that was intent on committing a crime, the defendant's action constitutes support, encouragement and incitement for the commission of the offense. *People* vs *Smock,* 399 Mich 282,249 NW 2d 69 (1979).

In the present case, trial witness Damen Youngblood testified that he and the deceased were alone in a home on Trinity Street In the city of Detroit on the night of the murder. Mr. Youngblood testified that the deceased opened the front door and Mr. Youngblood then observed two individuals force their way into the home through the back door (defendant Goza stated that he was one of the two individuals at the back door). -Witness Youngblood indicated that when the two individuals forced their way into the back of the house, co-defendant Webster entered through the front and shot the deceased in

the head. Witness Eric Youngblood testified that he returned to the homicide scene after the shooting and found his bedroom ransacked and several items including a safe containing cash and weapons were missing.

At trial, LaTonya Goza testified that all of the co-defendants were in the basement of a home on Freeland Street in Detroit and she heard one of the co-defendants indicate that he wanted his money. She also heard the co-defendant indicate that he knew where the safe was and that two individuals could be at the front door and two at the back when they went to obtain the money. She testified that all four co-defendants left together and that one of the co-defendant's admitted to killing the victim.

Loamoadre Van testified that he, and defendant Goza and co-defendant Dotson went to a motel and Mr. Van spoke to Goza and Dotson about the shooting incident, Defendant Goza said, "Yes, but you don't know anything." Vann testified that he saw large amounts of money in the motel room occupied by defendant Goza and co-defendant Dotson and that Goza was the one actually counting the money In the motel.

At the trial defendant Goza's statements were introduced. In his statement he indicated that a few weeks before the robbery and murder co-defendant Webster stated that he knew

about guns and money that he had seen at the home of the deceased. Co-defendant Webster and Goza discussed the idea of breaking into the home on the day of the murder. Webster stated that one of the Youngblood's owed him money. Goza further indicated there was an agreement by the co-defendants to go to the home of the deceased, go inside and get the safe that contained the guns and money. Defendant Goza admitted that he was at the back of the Youngblood residence and that he heard three shots. He stated he went inside, helped carry the safe to the car and received one-fourth of the money that was recovered from the safe.

Second degree murder requires that the actor either a) intended to kill, b) intended to do serious bodily injury or c) acted with wanton and willful disregard that the natural tendency to the behavior was to cause death or great bodily harm. *People vs Awon,* 409 Mich 672,299 NW *2d* 304 (198); *People vs Dykhousg,* 418 Mich 488, 346 NW 2d 150 (1984). Michigan law has long held that malice is a permissible inference if there is the use of a deadly weapon. *People vs Martin,* 392 Mich 653,221 NW 2d 338 (1874).

In the present case, the trier of fact could find beyond a reasonable doubt that defendant Goza aided and abetted in a second degree murder.

Evidence presented during the trial clearly indicated that the defendant was aware of the fact that guns and drugs were being stored in a safe at the residence of the deceased. There was circumstantial evidence to indicate that the four defendants were going to the residence of take the guns and money from the safe because those items would not be given up voluntarily by the victim or the Youngbloods. The four co-defendants went to the homicide location together, and entered the premises at the same time. The shooting occurred immediately upon entry into the home. Defendant Goza continued to assist by removing the safe counting the money and sharing the in the proceeds. All these factors provide ample circumstantial evidence to indicate that defendant Goza participated in an armed non-consensual entry and robbery of the homeowners and participated in a knowingly violent confrontation where one of the co-defendants was armed with a weapon and used the weapon to murder the deceased.

This Court finds that there was ample circumstantial evidence to establish that the defendant Goza aided and abetted in a second-degree murder. The defendant's claim of insufficient evidence falls.

III.

Defendant Goza contends that the Court looked outside the trial record making and based her decision on pre-trial motions and evidentiary hearing testimony regarding statements given to the police by the defendant and co-defendants. The defendant's claim is without merit. An examination of the Court's ruling reveals that the Court was making reference to statements that were made for impeachment purposes and the credibility of witnesses. Clearly the trier of fact could consider these matters in resolving credibility issues. As stated earlier, the Court is presumed to follow the law and no reversal is required. *People VB Edwards, supra.*

IV.

Finally, defendant Goza contends that a new trial is mandated because the police erroneously interfered with the defendant's assertion of his right to remain silent. The defense relies on the defendant's claim that he repeatedly indicated that he did not want to make a statement when initially advised of his rights by Sergeant Deborah Monti of the Detroit Police Department Homicide Section.

Michigan Court Rule 6.608(D)(2) states that the Court may not grant relief to the defendant if the motion alleges grounds for relief which were decided against the defendant in a prior appeal unless the defendant establishes that a retroactive change in

the law has undermined the prior decision. In the present case, the issue surrounding his claim of violation of the defendants right to remain silent was litigated on appeal. Pursuant to the Michigan Court Rule it cannot be re-litigated in the motion for relief from judgment. This Court does not find that the habeas corpus ruling in the Federal District regarding the co-defendant Green amounts to a retroactive change in the law as stated under Michigan Court 6.508(D)(2).

Conclusion

For the reasons set forth above, the defendant's motion for relief from judgment is denied. This Court does not find that the defendant's brief and attached appendices set forth sufficient evidence to establish the actual innocence of the defendant or a basis for the granting of a new trial.

IT IS SO ORDERED.

Date: Sep 19, 2006/S/ Timothy M. Kenny
Timothy M. Kenny
Circuit Court Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

ANTHONY GREEN,

Petitioner,

v Case No. 95-73785

JIMMY STEGALL,

Respondent.
_____/

MEMORANDUM AND ORDER CONDITIONALLY GRANTING WRIT OF HABEAS CORPUS

This is a habeas corpus case, 28 U.S.C. § 2254. Petitioner is challenging his state court conviction for second degree murder. The background of the case is reflected in the Order of June 28, 1996 (Exhibit A), in which the Court ordered the appointment of counsel, and the Memorandum of January 28, 1998 (Exhibit B), in which the Court found that there was a disputed issue of fact regarding the voluntariness of petitioner's statements that the state trial judge failed to resolve. On April 20 and 22, 1998, the Court conducted an evidentiary hearing on the

circumstances of petitioner's arrest and subsequent questioning by Detroit police officer Deborah Monti (Monti). The hearing was necessitated by the Court's determination that the state trial judge's finding that petitioner denied making any statement to Monti was wholly unsupported by the record. The Court took testimony from petitioner, Monti, and Tony R. Saunders, the Detroit police officer who took petitioner into custody and turned him over to Monti.

A.

Based on the transcripts of the state court preliminary examination, the trial testimony, and the evidentiary hearing; assessing the credibility of petitioner, Monti, and Saunders; and drawing such inferences as are reasonable, the Court finds:

1. There was an outstanding warrant for petitioner's arrest in the hands of Saunders.

2. Petitioner, through his attorney, made arrangements to surrender to Saunders.

3. Petitioner surrendered to Saunders. Saunders knew petitioner was represented by an attorney and that it was improper to question petitioner without his lawyer present.

4. Saunders took petitioner to Detroit police headquarters where he turned him over to Monti. Monti told Saunders that he must make out a Complaint Report (PCR) before she could accept custody of petitioner. Saunders made out the PCR.

5. Saunders told Monti that petitioner was represented by an attorney. As an experienced police officer, Saunders knew this was important information.

6. Monti questioned petitioner over his objections. During the course of the questioning, another Detroit police officer began squeezing defendant's wrists, which were secured by handcuffs.

7. When petitioner attempted to explain to the state trial judge[1] at his preliminary examination that he was forced to answer

---

[1]The state trial judge at the preliminary examination was the state judge at trial. Petitioner was tried by the bench.

Monti's questions and that Monti suggested his answers to him, the trial judge cut petitioner off and declined to allow him to explain the

circumstances of his surrender to Saunders and the events that followed.

8. The refusal to allow petitioner to explain carried over to the trial. As a consequence, petitioner's answers

to Monii's questions were admitted into evidence, through the testimony of Monti, by the state trial judge without any consideration of whether the circumstances of Monti's questioning of petitioner violated his constitutional rights.

B.

1.

The assertions by respondent, that "[a]lthough the petitioner had retained counsel, he did voluntarily surrender himself to the police and voluntarily submitted to questioning without the presence of counsel," is wrong. Petitioner voluntarily surrendered himself through his attorney, but petitioner did not voluntarily submit to questioning without his attorney being present. First, petitioner told Saunders he had an attorney. Second, Monti knew that petitioner had an attorney, having received this information from Saunders. This is established by the record made at the evidentiary hearing.

Monti testified as follows (Tr. 4/20/98, pp. 32 and 33):

Q. And do you recall interrogating Anthony Green?

A. Yes.

Q. And can you tell us, on May 21st, 1991, can you tell us what happened, how your interrogation came about?

A. I was working days at the Homicide Section that day, and I got a telephone call from an officer of the Major Crime Mobile Unit, I'm not sure exactly which one it was, but it might have been Sergeant Saunders, and he asked me if we were still looking for Anthony Green. And I told him that we were, and he, he informed me either that Mr. Green had turned himself in or was preparing to turn himself in, but in any event, I said yes, that we were still looking for him. So a short time later the officers of the Major Crime Mobile Unit delivered Mr. Green to the Homicide Section to my office. Initially I believe they brought him in my office, and I asked them if they had made their PCR, their Preliminary Complaint Record yet,

and they stated they hadn't. So they took Mr. Green from my office back out to the main area of the Homicide Section where there's a large table, fingerprint cards, black reports, and one or two typewriters and they prepared an arrest PCR, and at the completion of that they delivered Mr, Green back to my office.

Saunders testified as follows (Tr. 4/22/98, pp. 15-17):

Q. [Y]ou were aware [petitioner] was represented by Mr. Crawford?

A. I was aware based on what his secretary told me that he was.

Q. And at the time Mr. Green turned himself in he in fact told you I don't want to talk to you until I have my attorney present?

A. He could have. I had no intention of asking him any questions.

Q. So because you didn't intend to ask him any questions it wasn't significant to you whether or not he told you that or not?

A. Well, I knew he was represented by counsel, but I'm not the investigator of the case. . . .

Q. I believe you testified you don't have any independent recollection of speaking with Sergeant Monti about whether Mr. Green was represented by counsel or not?

A. That's correct, sir, yes.

Q. So you could have told her his lawyer is Tim Crawford?

A. Had I seen her, but 1 don't have an independent recollection of having a conversation with her.

Q. If you had seen her, would you have told her that he was -

A. If I had seen her.

Q. Because that would have been your standard practice in the Detroit Police Department?

A, That's my normal practice.

Q. So if you did see her, you probably told her?

A. If I did see her, I would have told her.

Q. That Mr. Green was represented by counsel?

A. Yes.

Although Saunders had no recollection at the evidentiary hearing of talking to Monti, he said that if he had seen her he would have told her petitioner was represented by an attorney. Monti testified at the evidentiary hearing she told Saunders to prepare a PCR. Therefore, it is reasonable to conclude that Monti talked to Sanders, and further, that having talked to Monti, Saunders told Monti that petitioner was represented by an attorney.

2

At the evidentiary hearing, petitioner testified as follows (Tr. 4/20/98, pp. 8-15):

Q. Then what happened? (after being taken into a room)

A. Well, when Detective Monti came in the room, she told me what her name was. She said her name was Detective Sergeant Monti.

THE WITNESS: She came in the room. She said

she was a sergeant. She asked me my name. I told her my name. She was reading some papers. I told her I was waiting on my attorney. She said, "Okay," and then she went on to conversate. I told her that my lawyer - no, she said, "I have a few questions for you." 1 said, "My lawyer told me not to answer any questions until he get here." She said, "Fine." She said she needed to ask me some questions, what school I went to, she asked me basic stuff about school, she asked me stuff about sports, and then she went and asked me did I know the victim of the crime.

Q. What did she ask about the victim of the crime and what did you tell her?

A. I asked her was this concerning the case, and she told me, "Yes." I told her my lawyer told me not to answer any questions concerning the case until he get here.

Q. And then what happened after that?

A. I think it was at that time she asked me to read which I know now was the rights form. At that time I told her I couldn't read, and she snatched the form.

Q. Why did you tell her you couldn't read?

A. Because I didn't want to be bothered. My lawyer told me not to sign anything.

Q. Could you at the time read and write?

A. Sure I could, yes.

Q. Did you make any effort to read what was on the form?

A. Not at all.

Q. Why is that"

A. Because my lawyer told me not to sign anything, and she wanted me to sign whatever it was, the rights form.

Q. Then what happened after that?

A. After I told her I couldn't read, then she snatched it and said something, I'm playing games, something to that sort, that I was playing games with her,

Q. All right. Then what happened?

A. She left out the room. I was sitting there. I just laid my head on the table.

Q. How long were you sitting in that room?

A. Somewhere between I'd say 20 minutes and an hour.

Q. Okay. Roughly how big was this room?

A. Say 11x6.

Q. All right. And at that time were you handcuffed?

A. No, sir.

Q. Was the door to the room open?

A. No, sir.

Q. Okay. So you were in this room alone unhandcuffed, the door opening out to this larger room?

A. No, the door opened out like to a hallway because it's right on the side other office.

Q. Okay. So after you were waiting in this room, then what happened?

A. They woke me up when they came in there. Sergeant Monti and two other officers.

Q. When you say they woke you up, had you fallen asleep?

A. Yes.

Q. Do you know how much time passed?

A. Somewhere between 20 minutes to an hour. I'm not exactly sure. I forgot my watch

Q. And after you were woken up by Officer Monti and these two officers, what happened?

A. When they came in the room, the officer asked me to stand up. I stood up. He asked me to turn around. I turned around. He put the handcuffs on me and then told me to have a seat

Q. Then what happened?

A. Well, she kept asking me questions. I specifically told her five or six times that I wouldn't answer any questions until my lawyer got there.

Q. Okay. What sort of questions was she asking you?

A. Did I know who killed this person, and tell

her what she needed to know about the robbery.

Q. Okay. And you responded to those questions how?

A. At that I responded I wasn't going to answer any questions until my lawyer got there, he'll be there in a little while.

Q. Then what happened?

A. Well, at that time she kept asking me questions. I said F you all. At that time the officer hit the table, he didn't hit me he hit the table, then he stood. Well, he came up in back of me and put his hands on my shoulders, he didn't squeeze me hard, he put his hands almost like a massage and saying that they was trying to help me and it would be best for me if I made a statement.

Q. And did they tell you anything else?

A. Yeah.

Q. What else?

A. Basically, you know, that the prosecutor was going to hit me up with the crime if I

didn't, you know, do what they wanted me to do and they was trying to save me and all of that type of stuff.

Q. When you say all of that type of stuff, can you be a little more specific?

A. Okay. Well, well, I don't remember the precise wording, but he was saying that the prosecutor was going to give me first degree murder if I didn't make a statement, you know, if I didn't help them out. They was trying to help me.

Q. How did you respond to that?

A. When my lawyer gets here, I'll make a statement.

Q. Then what happened?

A. At that time he put his hands on - I'm sitting here facing this way. He put his hands one hand on my shoulder and the other hand starting clicking the handcuff saying do what the lady says.

Q. When you say clicking the handcuffs, does that mean tighter on your wrist?

A. Yes.

Q. The handcuffs have a ratcheting mechanism that makes them tighter

A. Yeah. When you squeeze them, they click, and he was clicking them one at a time.

Q. How many times did he click them?

A. I'd say about - it was already tight when he put them on, but I'd say about three or four times.

Q. Then what happened after that?

A. After he started squeezing the handcuffs, Sergeant Monti asked me again, tell her - no, she asked me did I know who killed this person. I told her I did not know. At that time she went to reading and telling me what I had done.

Q. Okay. Do you specifically recall what she told you?

A. No, I don't - no. I wasn't even - it didn't even matter what she was saying. I was just trying to get out of them handcuffs.

Q. You've had a chance to review the contents of this statement that you signed in this case; is this correct?

A. This is correct.

Q. To the best of your recollection was she presenting you with information similar to that within that statement?

A. Yes.

Q. And what was your response?

A. I was agreeing. I was repeating what she was saying. Anything it took to get loose.

Q. Okay. So if she, for example, said do you know who killed Nicole Cash, what was your response?

A. Well, if she had asked me, if she had just asked me that question, I would have told her I didn't know, but it was more so like telling me what I had done, like when I went over there such and such, what happened. You know, she was giving me the information. I was repeating what she was saying.

Q. But you were basically agreeing with the way she described the events as what happened?

A. Yes.

Q. Why were you doing that?

A. Because he wasn't loosening up the handcuffs.

Q. Did you eventually - how long did this go on for?

A. I would say 30 to 40 minutes, if not longer. I didn't have on a watch. It seemed like days.

Q. Okay. If that officer hadn't been clicking on those handcuffs, would you ever have agreed to what Sergeant Monti told you?

A. No way.

Q. Did you ultimately sign a statement in this case?

A. Yes, I did.

This testimony is consistent with petitioner's description of Monti's questioning at trial (Memorandum of January 28, 1998, pp. 7-9).

C.

1.

As described in the Order of June 28, 1996, and

the Memorandum of January 28, 1998, petitioner was denied the opportunity to object to the admissibility of his statements to Monti at trial on the grounds that the statements were involuntary and, therefore, inadmissible. The trial judge never ruled whether the statements were voluntary. Because there has been no prior determination of the voluntariness of petitioner's statements, the Court has the obligation to make the determination. See Townsend v. Sain. 372 U.S. 293, 312-313 (1963) (overruled on other grounds. Kennev v. Tamavo-Reves. 504 U.S. 1 (1992)). Under the circumstances, the Court Finds that the statements were involuntary and hence inadmissible.

2.

An involuntary confession may not be used against a defendant. See Lego v. Twomey. 404 L'.S. 477 (1972); Miller v. Fenton. 474 U.S. 104 (1985). "[T]he Court's analysis has consistently been animated by the principle that 'ours is an accusatorial and not an inquisitorial system,' and that, accordingly, tactics for eliciting inculpatory statements must fall within the broad constitutional boundaries imposed by the Fourteenth Amendment's guarantee of fundamental fairness." Miller. 474 U.S. at 109-110 (quoting Rogers v. Richmond. 365 U.S. 534, 541 (I960))- When petitioner refused to answer

Monti's questions concerning the crime, petitioner was forced to respond. In an attempt to prevent pain, petitioner responded to Monti's questions. This alone makes the statements to Monti involuntary.

The argument that petitioner, because he denied making the statements, cannot challenge the statements has no merit for two reasons. First, standing to challenge the admissibility of incriminating statements does not depend upon an admission that the statements were made. See Lee v. Mississippi. 332 U.S. 742, 744 (1948) 2. Second,

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2. As the Supreme Court noted in Lee. 332 (cont) does not deny talking to Monti after she initiated questioning. What he obviously was trying to say was that Monti effectively told him what to say.

This second point gives rise to an additional ground for determining that petitioner's statements should not be admitted: petitioner invoked his Sixth Amendment right to counsel. "[H]aving expressed his desire to deal with the police only through counsel, [an accused] is not subject to further interrogation by

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(footnote continued) U.S. at 745-46; The due process clause of the Fourteenth Amendment invalidates a state court conviction grounded in whole or in part upon a confession which is the product of other than reasoned and voluntary choice. A

conviction resulting from such use of a coerced confession, (continued on next page) however, is no less void because the accused testified at some point in the proceeding that he had never in fact confessed, voluntarily or involuntarily. Testimony of that nature can hardly regalize a procedure which conflicts with the accepted principles of due process. And since our constitutional system permits a conviction to be sanctioned only if in conformity with those principles, inconsistent testimony as to the confession should not and cannot preclude the accused from raising the due process issue in an appropriate manner. While v. State of Texas. 310 U.S. 530, 531, 532 [(1940)j. Indeed, such a foreclosure (continued) of the right to complain 'of a wrong so fundamental that it made the whole proceeding a mere pretense of a trial and rendered the conviction and sentence wholly void,' Brown v. State of Mississippi. 297 U.S. 278, 2S6 [(1936)], would itself be a denial of due process of law. (Footnote omitted).

the authorities until counsel has been made available to him unless the accused himself initiates further communication, exchanges or conversations with the police." Edwards v. Arizona. 451 U.S. 477, 484-485 (1981). Whether Monti in fact told petitioner what to say or petitioner responded to her questions is not important. The critical point is that Monti, with knowledge that petitioner was represented by an attorney, initiated the questioning, not petitioner. See Michigan v. Jackson. 475 U.S. 625, 634 (1985) (the rule in Edwards applies in the context of the Sixth Amendment). "[B]efore a suspect in custody can be subjected to further interrogation after he requests an attorney there must be a showing that

the 'suspect himself initiates dialogue with the authorities.'" Oregon v. Bradshaw. 462 U.S. 1039. 1044 (1983) (quoting Wyrick v. Fields. 459 U.S. 42, 46 (1982)).

Respondent cannot argue that petitioner's statements were properly admitted because petitioner waived his right to counsel. A waiver of Sixth Amendment rights must be knowing, intelligent, and voluntary. See Patterson v. Illinois. 487 U.S. 285, 292 (1988). Petitioner did not voluntarily waive his Sixth Amendment rights.

D.

Finally, absent the confession, the evidence at trial was insufficient to establish petitioner's guilt. See Arizona v. Fulminante. 499 U.S. 279, 289 (1991) (harmless error analysis applies when coerced confession is admitted). The Court has previously found, based on its reading of the trial transcript of October 18, 1991, at pages 73-80, that the trial judge, in finding petitioner guilty, relied principally on petitioner's statements. See Memorandum of January 28, 1998, at 10. Such reliance was not a harmless error. Respondent's analysis of the evidence at trial against petitioner, independent of petitioner's statements, does not persuade the Court

otherwise. See Respondent's Supplemental Brief in Opposition to Petition for Writ of Habeas Corpus, at 15. All that respondent's analysis establishes is that petitioner was present at the meeting during which the robbery was planned, and was in possession at that time of a handgun. Given what occurred following the meeting, petitioner's presence at the meeting does not allow for the inference that he was part of the robbery.

E.

Accordingly, the petition for writ of habeas corpus is GRANTED and petitioner's conviction is VACATED. This grant of the writ is conditional. The State of Michigan shall have 60 days in which to decide whether it intends to retry petitioner.

SO ORDERED.

/S/ AVERN COHN

AVERN COHN

UNITED STATES DISTRICT JUDGE

DATED DEC 10 1998

Detroit, Michigan

US DISTRICT CT ORDER 6-28-96 A45

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

ANTHONY D. GREEN,

Petitioner,

v. Civil No. 95-73785

JIMMY STEGALL, Warden,
Macomb Correctional Facility,

Respondent.
_____/

ORDER

Before the Court is a Petition for a Writ of Habeas Corpus under 28 U.S.C. § 2254 in which the petitioner is challenging the validity of his conviction on several grounds, including that the trial court violated his due process rights by refusing to suppress an involuntary confession. A magistrate judge recommends the Petition be dismissed. Petitioner takes exception to the magistrate judge's finding that:

[A] review of the trial transcript clearly demonstrates that the Petitioner has never sought to challenge the voluntariness of the statement

allegedly given to the police. He simply claimed that he had no recollection of giving such a statement. . . . [T]he voluntariness of the statement was never an issue. . . .

Because the claim was not based upon voluntariness, but rather that the confession was never made, the trial judge correctly left it up to the fact finder at trial (ultimately itself) to decide whether Petitioner actively gave the statement in question.

The Court's reading of the transcript of the August 13, 1991 motion hearing suggests instead that petitioner testified that he made a statement and that it was coerced.

When questioned by his lawyer, petitioner testified as follows:

Q. (By Mr. Crawford continuing) In respect to the statement did you give it of your own free will?

A. No, I did not.

Q. What caused you to give a statement?

A. Squeezing the wrist.

Q. Were your wrist [sic] being squeezed at

the time you made verbal [sic] statement?

A. Yes, it was.

Q. Then in your opinion was your statement voluntary or involuntary?

A. Involuntary, for sure.

(Transcript of August 31, 1991 Hearing at 23-24). The cross-examination went as follows;

THE COURT: What kind of questions was she asking you, sir, about the weather, what kind of questions were being asked, how you get the weather or what?

THE DEFENDANT: No/ she was asking questions off the paper she was reading. What I am saying I wasn't concentrating on what she was saying, what she was saying on the sheet of paper. I was concentrating on getting that handcuff loose, that's all that was on my mind.

THE COURT: What answer was given when she told you to answer?

THE DEFENDANT: I —

THE COURT: No, no, answer the question Mr. Green. Stop playing games here. What answer was given, the one she told you to give, the ones that came out of your mouth?

THE DEFENDANT: I'm sure I said no to that question when she asked did I kill her or know who killed her.

THE COURT: Answer the question, sir, you gave some answer out of your mouth?

THE DEFENDANT: No, nothing but that one.

THE COURT: Just one?

THE DEFENDANT: Only one, did I know who killed this person.

THE COURT: None of the answers did you give or answer?

THE DEFENDANT: No, I heard the questions. I was trying to say anything she wanted me to say so I could get loose. She was telling me what I done.

THE COURT: You are saying that any answers

on this page are answers that the Sergeant gave, not your words? Fine, get down because I can't suppress something that somebody said they never said. I have no time to play games with people. I can't suppress something people said they never said.

MR. CRAWFORD: I think it can be cleared up.

THE COURT: He said he didn't make an answer. He said all the answers came out of this woman's mouth, not his.

MR. CRAWFORD: I think, your Honor, —

THE COURT: No Mr. Crawford I cannot suppress a statement that people say they never made.

MR. CRAWFORD: I understand that, your Honor.

THE COURT: He said the answers came out of officer Monte's mouth. There is nothing to suppress, nothing to rule on.

MR. CRAWFORD: Your Honor, I have argument.

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> THE COURT: Have a seat Mr. Crawford, you have no argument to that issue. Set down. Call your next witness or Mr. Lusby, let's not waste time here gentlemen. We have wasted all morning getting here as it is.(Id. at 26-28) .

The Court does not read this testimony as petitioner stating he did not make a statement. Rather there is considerable ambiguity in the record. It is not clear whether petitioner was saying that he parroted the police officers' words or simply said nothing. The trial judge's abruptness in terminating petitioner's testimony and denying his lawyer an opportunity to argue compounds the ambiguity. Under the circumstances, counsel should be appointed for petitioner and the question better briefed than is possible by a pro se petitioner.

Accordingly, the deputy clerk will arrange for the appointment of counsel for petitioner and afterwards set a briefing schedule for further consideration of the Petition by the Court.

SO ORDERED.

/s/ AVERN COHN
AVERN COHN
UNITED STATES DISTRICT JUDGE

US DISTRICT CT ORDER 6-28-96
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DATED: JUN281996

DETROIT, MICHIGAN

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

ANTHONY D. GREEN,

Petitioner,

v. Civil No. 95-73785

JIMMY STEGALL, Warden,
Macomb Correctional Facility,

Respondent
_____/

MEMORANDUM

I.

This is a habeas corpus case. 28 U.S. C. § 2254. The background of the petition is reflected in the Michigan Court of Appeals decision of November 2, 1994, People of the State of Michigan v. Anthony Green. No. 150816 (unpublished), and the Magistrate Judge's Report and Recommendation of May 8, 1996, recommending that the petition be denied, and the Order of June 28, 1956, appointing counsel for petitioner.

Essentially petitioner challenges his state court conviction for murder in the second degree and armed robbery, Mich. Stat. Ann. § 28.549, Mich. Stat. Ann. § 28.797, for which he is serving a 25 to 60 year custody term and a 15 to 30 year custody term

concurrently on the two convictions. Petitioner says his conviction is constitutionally defective because of the admission of an involuntary confession at trial. Respondent says that petition lacks merit because petitioner denied ever making the statement in question and therefore had no right to challenge its admission. Petitioner is right--he did in fact make the statement and, unfortunately, the trial judge did not assess its voluntariness. Rather, the record establishes that the trial judge peremptorily refused to consider whether the statement was voluntary because of an arbitrary interpretation of petitioner's testimony.

Because of the uncertainty of the consequences of this finding, the Court will hold a hearing to determine the future course of the case.

II.

The facts underlying the petition are essentially as follows. To fully illustrate the egregiousness of the proceedings, the records of the Walker* hearing and trial will be quoted at length.

A.

On March 22, 1991, Nicole Cash was killed during the course of a robbery of her home. Petitioner was charged with participating in the robbery. He was alleged to have driven a car to the home with the co-defendants as passengers and then positioning himself in the rear of the home to guard against anyone escaping from it.

*People v. Walker, 374 Mich. 331 (1965).

B.

1.

Prior to trial petitioner moved to suppress a statement he gave to the police following his surrender and arrest. A pretrial, or Walker.1 hearing was held on August 13, 1991, at which the trial judge presided, to determine the voluntariness of the statement. Petitioner testified that he contacted his lawyer to arrange the arrest and was instructed by his lawyer not to say or sign anything without his lawyer present.

Q. Did that counsel give you any advice as to answering any questions as to any police officers, any where in the world concerning that homicide, did that counsel give you advice.

A. Yes, you did.

Q. To the best of your recollection what advice did I give you?

A. For me not to answer any questions concerning the case or anything until you got there. Don't sign nothing or make any statements until you got there.

Q. When you walked into the police station was that your attitude in answering any questions to any police officers any where?

A. That is correct.

Q. Did you ever change that any where

voluntarily?

A. No, I didn't.

Petitioner testified that after he surrendered to the police through his attorney, he was taken to Detroit Police Headquarters where he was questioned by Sergeant Deborah Monte (Monte). Although petitioner told Monte that his attorney was supposed to meet him at the Mobile Crime Unit on McGraw Street, Monte questioned petitioner in the absence of his attorney.

Q. Tell us what happened and keep it as brief as possible when she came in the room.

A. When she came in the room she said my name is Sergeant Monte. She said what is your name. I said Anthony Green. She looked at the sheet of paper. I said I was waiting on my lawyer. She said okay fine. I want to ask you a couple of questions so we can get you out of here. At that time I said my lawyer told me not to say anything about the case or sign anything until he gets here. She said okay. She wanted to ask me some questions. She asked me about school. She asked me did I play sports. Then she went back and asked me, asked me did I know Nicole Cash [and] I said is this concerning the case. ... I told her my lawyer said not to answer any

questions concerning the case. She said I am trying to get you out of here quicker.

Petitioner's attorney then proceed to raise and develop the issue of voluntariness. Petitioner testified that during questioning an officer handcuffed him and squeezed his wrists to the point that petitioner received scars and nerve damage.

Q. (By Mr. Crawford continuing) Go on?

A. [Monte] kept asking me questions. I put my head down. I put my head down like I wasn't paying attention to her. At that time she told me to read the form. At this time I guess it was the right form she was talking about. I told her I couldn't read. She said I wanted Co play games. She came back twenty or thirty minutes later with two officers, the officer in charge of her and she was in the middle. One officer was in back of her. The officer came in there with handcuffs and told me to get up.

* * *

Q. What occurred next?

A. He put the handcuffs on me and told me to sit in the seat and he--

* * *

A. One of the officers was in back of me and one stayed at the door all the time, he never left the door. She said I want you to make a statement now and I said I told you I will not make a statement until my lawyer gets here. He put his hands on my shoulders and he didn't yank hard he swung it and said do what the ladv said and make it easier on yourself.

* * *

Q. What did he do in terms of physicalness to yourself?

A. He started squeezing my left wrist. I don't know why he picked the left wrist. He, I don't know why he picked the left wrist. He started squeezing my left wrist while he told me to make a statement.

* * *

Q. As a result of [squeezing] the handcuffs on the wrist what physically occurred to the wrist?

A. A nerve was damaged in the wrist.

Q. Did you receive physical scars as a result of that?

A. Yes. I did.

Q. Would you hold your hand up and show the scars that resulted from the handcuffs on the wrist?

A. Okay, these are the marks.

Q. You have to hold that wrist-"

THE COURT: I can see it.

Q. (By Mr. Crawford continuing) As a result of those scars did you receive any type of medical attention?

A. Yes, I did.

(Emphasis added) . Although it was obvious that petitioner's attorney was developing a record to attack the voluntariness of petitioner's statement, the trial judge abruptly intervened and peremptorily refused to allow the questioning to continue:

Q. Did the doctor tell you that you had a definite injury?

A. He said nerve damage.

Q. To the best of your recollection of that injury how did you get the nerve damage?

A. Squeezing my left wrist in the handcuffs.

THE COURT: Save all of that for Circuit Court. Get to the statement and your client's position that he was making every indication and waiting for you to arrive.

MR. CRAWFORD: It kind of like goes to the voluntariness.

THE COURT: No, it doesn't. That's a civil matter. This is a criminal court. Save that for a civil jury.

(Emphasis added). Petitioner's attorney nevertheless continued:

Q. In respect to the statement did you give it of your own free will?

A. No. I did not.

Q. What caused you to give a statement?

A. Squeezing the wrist.

Q. Were your wrist being squeezed at the time you made verbal statement?

A. Yes, it was.

Q. Then in your opinion was your statement voluntary or involuntary?

A. Involuntary, for sure.

(Emphasis added).

Petitioner was then cross-examined. The prosecutor raised the issue of voluntariness as well, although his examination was brief because the trial judge once again intervened. The record shows that a great deal of confusion occurred during the trial judge's questioning of petitioner. Notwithstanding the question in the record regarding voluntariness, as well as the petitioner's repeated assertions that he could not concentrate during Monte's questioning because an officer was squeezing his handcuffs, the trial judge found that petitioner's position was that he did not make any statements to Monte. After making this finding, the trial judge stated that she had "nothing to rule on" with respect to voluntariness and would not "waste time" to address the voluntariness issue. The entire cross-examination of petitioner follows.

BY MR. KING:

Q. Sir, you made an involuntary statement to the police?

A. Yes, that is correct.

Q. They asked you if you shot anybody and

you said no?

A. They never asked if I shot anybody.

Q. They asked if you seen anybody get shot and you said no?

A. I didn't answer any questions concerning this case.

Q. They didn't ask any questions concerning this case. In other words you didn't give a statement?

A. I didn't give a statement until he done what he done.

Q. Any statement you gave, what statement did you give them?

A. She asked me questions. I was going by what she said.

THE COURT: He wants to know what answers you gave, sir.

THE DEFENDANT: She was giving the answers with the questions. I don't know. even know what happened in the case. The only thing I said is what she told me. she said.

Q. (By Mr. King continuing) Everything you told her was involuntary, right?

A. That is correct.

Q. Did she ask you did you shoot Nicole Cash, did she ask you that?

A. That's what I was trying to explain.

Q. Please answer my question. Did she ask you did you shoot Nicole Cash?

A. Like I said I didn't know what she was saying.

Q. Your answer is no, your answer is no?

MR. CRAWFORD: He is arguing with the witness.

THE COURT: Mr. Green, this man's job is to ask you questions. However the questions and answers got there on that paper is what he wants to 'know. He has the right to ask you. Do you remember being asked this question, did you shoot Nicole Case whether he asked you that question or somebody else told you, asked you that question. He wants to know was that

one of the questions asked.

THE DEFENDANT: Truthfully I can't remember certain questions. I wasn't thinking about the questions at the time.

THE COURT: What kind of questions was she asking you, sir, about the weather, what kind of questions were being asked, how you get the weather or what?

THE DEFENDANT: No. she was asking questions off the paper she was reading. What I'm saying I wasn't concentrating on that. I wasn't concentrating on what she was saying, what she was saying on the sheet of paper. I was concentrating on getting that handcuff loose, that's all that was on my mind.

THE COURT: What answer was given when she told you to answer?

THE DEFENDANT: I--

THE COURT: No, no, answer the question Mr. Green. Stop playing games here. What answer was given, the one she told you to give, the ones that came out of your

mouth?

THE DEFENDANT: I'm sure I said no to that question when she asked did I kill her or know who killed her.

THE COURT: Answer the question, sir, you gave some answer out: of your mouth?

THE DEFENDANT: No, nothing but that one.

THE COURT: Just one?

THE DEFENDANT: Only one, did I know who killed this person.

THE COURT: None of the answers did you give or answer?

THE DEFENDANT: No. I heard the questions. I was trying to say anything she wanted me to sav so I could get loose. She was telling me what I done.

THE COURT: You are saving that any answers on this page are answers that the Sergeant gave. not your words? Fine. get down because I can't suppres ssomething that somebody said they never said. I have no time to play games with people. I can't

suppress something people said they never said. (Emphasis added).

Petitioner's attorney immediately attempted to clarify petitioner's position. The trial judge, however, after blatantly misconstruing petitioner's testimony, once again refused to consider the voluntariness of the statement.

MR. CRAWFORD: I think it can be cleared up.

THE COURT: He said he didn't make an answer. He said all the answers came out of this woman's mouth, not his.

MR. CRAWFORD: I think, you Honor,--

THE COURT: No Mr. Crawford I cannot suppress a statement that people say they never made.

MR. CRAWFORD: I understand that, you Honor.

THE COURT: He said the answers came out of officer Monte's mouth. There is nothing to suppress. nothing to rule on.

MR. CRAWFORD: Your Honor, I have argument.

THE COURT: Have a seat Mr. Crawford, you

have no argument to that issue. Set down. Call your next witness or Mr. Lusby, let's not waste time here gentlemen. We have wasted all morning getting here as it is .

(Emphasis added).

2.

Ac trial, petitioner's statement was admitted in evidence through the testimony of Monte. Petitioner's attorney objected to the admission of the testimony into evidence, but the trial judge, who had also been the hearing judge, overruled the objection:

MR. CRAWFORD: The only objection. I think the statement was forcefully extracted from the Defendant based on the injuries that existed that day.

THE COURT: Have you had a pre-trial motion based on suppress based on that issue.

MR. CRAWFORD: We have.

THE COURT: Was there a ruling?

MR. CRAWFORD: Yes, there was.

THE COURT: I believe there was no ruling because your .client's comments made it a mute issue. . . .

(Emphasis added).

The trial judge, in finding petitioner guilty, relied principally on the statement. (Transcript of October 18, 1991, pp. 73-80).

C.

The Michigan Court of Appeals, in an unpublished opinion, affirmed the trial court. The court framed the issue as follows:

Turning to the issues raised by defendant Green, he first argues that the trial court erred in introducing his statement which was not voluntarily obtained and obtained in violation of his right to counsel. We disagree. At the Walker hearing held concerning the admissibility of defendant's alleged statement to the police, defendant did not contest either the voluntariness of the statement or whether he had invoked his right to counsel, but rather denied making a statement to the police at all. That is, defendant claimed at the hearing that he had made no statements, that the answers to the questions in his alleged confession had come from the interrogating officer. Thus, the question was not whether defendant had voluntarily made a statement, but whether he had made a statement at all. This latter question involves a question of credibility to be resolved by the trier of fact. That is, that was for the trier of fact to determine whether the officer testified truthfully concerning defendant's having made a statement and the content of that statement.

People v. Green, No. 150816, at p.3 (unpublished); decided November 2, 1994 (footnote omitted).

III.

A.

An involuntary confession may not be used against a defendant. See Lego v. Twomey. 404 U.S. 477 (1972); Miller v. Fenton. 474 U.S. 104 (1985). " [T]he ultimate question whether, under the totality of the circumstances, the challenged confession was obtained in a manner compatible with the requirements of the Constitution is a matter for independent federal determination." Miller. 474 U.S. at 112. "The aim of the requirement of due process is not to exclude presumptively false evidence, but to prevent fundamental unfairness in the use of evidence, whether true or false." Colorado v. Connelly. 479 U.S. 157, 167 (quoting Lisenba v. California. 314 U.S. 219, 236 (1941)).

Pursuant to 28 U.S.C. § 2254 (d) , an application for writ of habeas corpus may be granted if the adjudication of the claim:

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light

of the evidence presented in the State court proceeding.

The United States Supreme Court has stated: "Where the facts are in dispute, the federal court in habeas corpus must hold an evidentiary hearing if the habeas applicant did not receive a full and fair evidentiary hearing in a state court, either at the time of the trial or in a collateral proceeding. In other words a federal evidentiary hearing is required unless the state-court trier of fact has after a full

hearing reliably found the relevant facts." Townsend v. Sain. 372 U.S. 293, 312-13 (1963).2

B.

The refusal of the hearing judge to rule on the voluntariness of the statement based on a finding that petitioner denied making the statement is belied by the record. Petitioner testified that the statement he gave Monte was a parroting of her words in an effort to avoid further pain. The trial judge's refusal to address the issue of voluntariness based on an arbitrary interpretation of petitioner's testimony was unreasonable under the circumstances. 3

2 Townsend was overruled on grounds unrelated to this case by Keeney v. Tamayo-Reyes. 504 U.S. 1 (1992) . The Supreme Court in Townsend stated in part:[A] federal court must grant an evidentiary hearing to a habeas applicant under the following circumstances. If (1) the merits of the factual dispute were not resolved in the state hearing; (2) the state factual determination is not fairly supported by the record as a whole; (3) the fact-finding procedure employed by the state court was not adequate to afford a full and fair hearing ... or (6) for any reason it appears that the state trier of fact did not afford the habeas applicant a full and fair fact hearing. Townsend. 372 U.S. at 313.

3 Similarly, the Michigan Court of Appeals' statement that "at the Walker hearing .defendant did not contest the FOOTNOTE CONTINUED).

In finding petitioner guilty, the trial judge did not clearly articulate the evidentiary basis for her conclusion. Inferentially, it is fair to conclude that the statement was integral to the finding of guilty because it appears there was no other evidence of any substance against petitioner.

Accordingly, petitioner's conviction cannot stand if the statement was involuntary. Because there has been no prior determination of whether the statement was involuntary, it appears that this Court has the obligation to make that determination. See Town send. 372 U.S. at 312-13. Because the course the Court should follow is not clear, the Court will hold a further hearing to be scheduled by the deputy clerk.

/s/ AVERN COHN

AVERN COHN

UNITED STATES DISTRICT JUDGE

DATED: JAN281996

_____ (footnote continued)

voluntariness of the statement" further grossly misconstrues the record. Indeed, petitioner's attorney was attempting to develop the record to contest voluntariness, and petitioner himself said "I was crying to say anything she wanted me to say so I could get loose" immediately prior to the judge's finding that "I can't [suppress] something that somebody said they never said."

MI CT OF APPEALS ORDER 7-26-07 A72

Court of Appeals, State of Michigan

ORDER Michael J. Talbot

Presiding Judge

People of MI v ROBERT GOZA

Docket No. 276870 E. Thomas Fitzgerald

LC No. 91/005995 Michael R. Smolenski

Judges

The Court orders that the delayed application for leave to appeal is DENIED for failure to meet the burden of establishing entitlement to relief under MCR 6.508(D).

_____

Presiding Judge

A true copy entered and certified by Sandra Schultz Mengel, Chief Clerk, on

[SEAL]

Date JUL 26, 2007 /s/ Sandra Schultz Mengel

Chief Clerk

MICH SUPREME CT ORDER 11-29-07 A73

Order **Michigan**

Supreme Court

Entered November 29, 2007 **Lansing,**

Michigan

134727 Clifford W.

Taylor

Chief Justice

Michael F. Cavanagh

PEOPLE OF THE Elizabeth A.

Weaver

STATE OF MICHIGAN, Marilyn

Kelly

Plaintiff-Appellee, Maura D.

Corrigan

Robert P. Young, Jr.

v Stephen J. Markman

Justices

ROBERT GOZA, SC:

134727

COA:276870

Defendant-Appellant. Wayne CC: 91-005995

_____/

On order of the Court, the application for leave to appeal the July 26, 2007 order of the Court of Appeals is considered, and it is DENIED, because the defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). [SEAL]

I, CORBIN R. DAVIS, Clerk of the Michigan

Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of Court.

November 29, 2007 /s/ Corbin R. Davis

Clerk